

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

iRACING.COM MOTORSPORT SIMULATIONS,
LLC, a Delaware Limited Liability Company,

Plaintiff,

v.

TIM ROBINSON, individually and d/b/a
www.ow-racing.com and www.torn8oalley.com

Defendant.

X

Civil Action No.
05-11639 NG

AFFIDAVIT OF IRWIN B.
SCHWARTZ TO:

(1) CERTIFY NOTICE
UNDER RULE 65(B);

(2) REQUEST HEARING
ON TRO APPLICATION

X

Irwin B. Schwartz hereby states as follows:

1. I am an attorney duly admitted in the Commonwealth of Massachusetts and this Court and a member of the law firm Petrie Schwartz LLP. My firm is counsel to plaintiff iRACING.COM Motorsport Simulations, LLC, ("iRacing"), plaintiff in this matter and I submit this affidavit to address the concerns raised by the Court in its Electronic Order of August 12, 2005 (the "Electronic Order") with respect to the notice provided to defendant Tim Robinson ("Robinson") of the Application for Temporary Restraining Order and Expedited Discovery (the "TRO Application") submitted herein.

iRacing Did Not Seek TRO Without Notice

2. Federal Rules of Civil Procedure Rule 65(b) provides for no-notice temporary restraining orders upon, among other things, certification by counsel of the efforts made to give notice or the reasons why notice should not be required:

A temporary restraining order *may be granted without written or oral notice* to the adverse party or that party's attorney *only if* (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice *and the reasons supporting the claim that notice should not be required*.

Fed. R. Civ. P. 65(b)(emphasis added). The comments to Rule 65(b)'s 1966 amendments explain that this is to encourage informal notice of the TRO application upon the defendant if feasible:

The subdivision is amended to make it plain that informal notice, which may be communicated to the attorney rather than the adverse party, is to be preferred to no notice at all. Before notice can be dispensed with, the applicant's counsel must give his certificate as to any efforts made to give notice and the reasons why notice should not be required. This certificate is in addition to the requirement of an affidavit or verified complaint setting forth the facts as to the irreparable injury which would result before the opposition could be heard.

3. As set forth below, iRacing provided Robinson with contemporaneous informal notice of the TRO Application by e-mail and formal notice by Federal Express overnight delivery.¹ Accordingly, iRacing did not submit certification under Rule 65(b) of why notice would be improvident.

iRacing Confirmed Robinson's E-mail And Physical Address

4. On Friday August 5, 2005, iRacing filed its Complaint against Robinson individually and d/b/a www.torn8oalley.com and www.ow-racing.com ("Websites") and

¹ The certificate of service attached to the Memorandum In Support Of Application For Temporary Restraining Order and Expedited Discovery states, "I filed the foregoing document with the Clerk of the Court using the CM/ECF system, and served the same by Federal Express and e-mail to Mr. Tim Robinson, 2104 Poppy Lane, Richardson, Texas 75081-4709 at swdiecast@ow-racing.com". Upon review of the docket following the Electronic Order, it appears that the ECF filing of the Ex Parte Application For Temporary Restraining Order and Expedited Discovery and the other documents submitted with the TRO application omitted the certificate of service, which was identical to

obtained summonses for Robinson and the Websites for service at 2104 Poppy Lane, Richardson, TX 75081.²

5. Early in the morning on Monday August 8, 2005, Robinson sent an e-mail addressed from swdiecast@ow-racing.com to an associate in my firm complaining about my firm's communications with the Websites' host in which communications we requested that the hosts cease publishing Robinson's applications in violation of iRacing's copyrights. Robinson's e-mail asked that we provide him with the legal basis for our requests to the hosts.

6. On Monday August 8, 2005, I responded to Robinson by e-mail addressed to swdiecast@ow-racing.com informing him of this action, attaching pdf copies of the complaint and summonses, and informing him that I would have additional court papers to send to him. In that e-mail posting I asked where I could have the additional papers delivered if he had not yet retained counsel.³

7. Robinson responded to me by e-mail from swdiecast@ow-racing.com shortly thereafter stating that he had not yet retained counsel and that we should use his home address.

8. I responded by e-mail to swdiecast@ow-racing.com asking Robinson to confirm his address for Federal Express delivery.

Memorandum's certificate of service. A certificate of service relating to all the other documents submitted with the TRO application will be filed by ECF shortly.

² While not at issue for this affidavit, the complaint and summonses were served in hand on August 10, 2005.

³ Copies of all referenced e-mail communications will be provided to the Court upon request.

9. Robinson's responded by e-mail from swdiecast@ow-racing.com that we already had his address, evidently referring to 2104 Poppy Lane, Richardson, TX 75081.

iRacing Provided Contemporaneous Notice Of The TRO Application To Robinson

10. Later in the day on Monday August 8, 2005, iRacing filed an Application for Temporary Restraining Order and Expedited Discovery, Memorandum In Support Of Application For Temporary Restraining Order And Expedited Discovery, [Proposed] Order on Application for Temporary Restraining Order and Expedited Discovery, and Affidavit of David Kaemmer in Support of the Application for Temporary Restraining Order and Expedited Discovery (together the "TRO Papers") through the ECF system.

11. Within a few minutes of the TRO Papers' ECF filing I sent the TRO Papers to Robinson as pdf files attached to an e-mail addressed to swdiecast@ow-racing.com and, later that afternoon, we sent the TRO Papers in paper form by Federal Express addressed to Robinson at 2104 Poppy Lane, Richardson, Texas 75081.

12. On Wednesday August 10, 2005, we received confirmation from Federal Express that it delivered the TRO Papers to Robinson in hand.

iRacing Requests A Hearing Date

13. On Wednesday August 10, 2005, I called chambers to inquire as to the Court's individual practices for setting a hearing date on a temporary restraining order application. The courtroom clerk informed me that Judge Gertner was away and would not consider the TRO Application until Monday August 15, 2005 at the earliest, at which time the Court would determine if and when a hearing would be scheduled. I informed

the clerk that we had accomplished actual service of the TRO Papers by e-mail and Federal Express and I suggested that I would file an affidavit to so notify the Court. Given Judge Gertner's absence, I indicated I would file the affidavit by Friday, August 12, 2005, since it appeared that there was no urgency in demonstrating notice prior to Judge Gertner's return.

14. Accordingly, iRacing respectfully requests that the Court set a hearing on the TRO Application no later than Wednesday August 17, 2005 since Robinson has had actual notice of the TRO Application since Monday, August 8, 2005.⁴

SWORN AND SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY
THIS 12th DAY OF AUGUST, 2005.

/S/ Irwin Schwartz
Irwin B. Schwartz BBO #548763
Petrie Schwartz LLP
500 Boylston Street, Suite 1860
Boston, Massachusetts 02116
(617) 421-1800
(617) 421-1810 (fax)

⁴ I have plans to fly to Tokyo on the morning of August 18, 2005, returning on August 23, 2005, and respectfully request that the Court hear the TRO Application prior to that trip.

Certificate of Service

I, Irwin B. Schwartz, attorney for Plaintiff iRacing.com Motorsport Simulations, LLC, hereby certify that on this 12th day of August 2005, I filed the foregoing document along with the with the Clerk of the Court using the CM/ECF system, and served the same by Federal Express and e-mail to Mr. Tim Robinson, 2104 Poppy Lane, Richardson, Texas 75081-4709 at swdiecast@ow-racing.com

/S/ Irwin Schwartz

Irwin B. Schwartz